

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of	)	MM Docket No. 93-88
	)	
<b>EZ COMMUNICATIONS, INC.</b>	)	File No. BRH-910401C2
	)	
For Renewal of License of FM Radio	)	
Station WBZZ(FM) on Channel 229B	)	
at Pittsburgh, Pennsylvania	)	
	)	
<b>ALLEGHENY COMMUNICATIONS GROUP,</b>	)	File No. BPH-910628MC
<b>INC.</b>	)	
	)	
	)	
For Construction Permit for	)	
a New FM Broadcast Station on	)	
Channel 229B at Pittsburgh,	)	
Pennsylvania	)	

To: Honorable Edward Luton  
Administrative Law Judge

**REPLY OF ALLEGHENY COMMUNICATIONS GROUP, INC. TO  
PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW  
OF EZ COMMUNICATIONS, INC. AND MASS MEDIA BUREAU**

**ALLEGHENY COMMUNICATIONS GROUP,  
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Date: February 22, 1994

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**SUMMARY**

Allegheny's very substantial preference under the diversification criterion prevails over EZ's failure to establish in a probative manner its claim to a renewal expectancy.

EZ's programming during the renewal period was marginal with regard to local public affairs programming. During the bulk of the day (9 A.M. - 1 A.M.) there was no news, and no public affairs programming. The only local public affairs program produced by WBZZ ran at 7 A.M. on Sunday mornings. The other non-entertainment programming relied on by EZ was not local, and was broadcast from 4 A.M. to 7 A.M. on Sunday.

Any EZ claim to a renewal expectancy is outweighed by the flagrant sexual harassment case which occurred at the station during the license renewal period.

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Allegheny Communications Group, Inc. (Allegheny), by counsel, hereby replies to the Proposed Findings of Fact and Conclusions of Law of EZ Communications, Inc. (EZ) and the Mass Media Bureau (Bureau).

**I. DIVERSIFICATION**

1. EZ's listing of its other broadcast interests is incomplete as EZ fails to acknowledge the following five radio stations which were owned by EZ as of September 3, 1991, which was the cut-off date for amendments as a matter of right and

thus are attributable to EZ although the stations were subsequently sold. (Tr. 307-311):

**Stations Omitted by EZ**

<u>Station</u>	<u>Facility</u>	<u>City of License</u>
KISP	AM-5 Kw, full time	Phoenix, AZ
KMXX	FM-Class C	Phoenix, AZ
WOKV	AM-10 Kw, full time	Jacksonville, FL
WKQL	FM-Class C	Jacksonville, FL
WHQT	FM-Class C	Miami, FL

The September 3, 1991 date was established since Allegheny's application, as the later-filed application, was noted for tender on a Commission Public Notice (Report No. 15052, P. 8) released August 2, 1991, see Commission Rule 73.3522(a)(6). Thus the list of EZ station ownership contained in Allegheny's Proposed Findings Par. 4 is correct, with the addition of the following two stations recently acquired by EZ.<sup>1</sup>

<u>Station</u>	<u>Facility</u>	<u>City of License</u>
KUSA	AM-5 Kw, full time	St. Louis, MO
KSD-FM	FM-Class C	St. Louis, MO

(Tr. 311-313).

2. It may be noted that in failing to list in its Proposed Findings the Phoenix, Jacksonville and Miami stations which it owned as of the cut-off date, EZ followed its hearing exhibit, EZ Ex. 6, which also omitted these five attributable stations, leaving it to cross-examination to produce a complete listing. EZ further seeks to minimize its media

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<sup>1</sup> EZ's Proposed Findings disclose in a footnote (P. 2) that the two additional St. Louis stations were acquired December 27, 1993. Since no contemporaneous divestiture statement was made by EZ, these two additional stations are attributable to EZ.

interests by its treatment of its arrangement with FM station WQKB, New Kensington, PA. EZ's cursory statement (Findings, Par. 59) that it has a Local Marketing Agreement (LMA) with WQKB fails to address the very substantial amount of programming (156 to 160 hours per week) produced by EZ employees for broadcast over WQKB as well as the fact that in terms of staff, advertising, marketing, and studio space, EZ has assumed basic aspects of WQKB's operation. See Allegheny's Proposed Findings, Pars. 5-7. EZ also fails to acknowledge the explicit terms of Commission Rule 73.3555(a) (2)(i) which provides that where the principal community contours of two stations overlap, as is the case with WBZZ and WQKB, then if one licensee

"... brokers more than 15 percent of the broadcast time per week of the other such station, that party shall be treated as if it has an interest in the brokered station..."

Thus, WQKB is clearly attributable to EZ.

3. EZ compounds its failure to acknowledge the facts and law concerning WBZZ/WQKB by contending instead (Findings, Par. 65) that EZ's proposed purchase of WQKB would further the Commission policy underlying relaxation of the duopoly ownership rule in radio. First, even if there were a factual basis (which there is none) for EZ's argument, that does not alter the legal reach of the above-cited Rule that in the situation which now exists, with EZ brokering far in excess of the 15 percent level of programming on WQKB, the New Kensington station is attributable to EZ. As for the

assertion that EZ's proposed acquisition of WQKB would serve the Commission policy of furthering competition, this is contrary to the evidence here that a motivating factor in EZ's LMA, under which the programming of WQKB was changed, was to remove the format competition previously posed by WQKB (See Allegheny Findings, Par. 6). Thus, in addition to the application of the Rule, there is evidence that EZ's motivations included stifling competition, the antithesis of the Commission's policy.

4. Based upon the precedent and argument set forth in Allegheny's Proposed Conclusions Pars. 2-8, Allegheny is entitled to a more than substantial diversification preference.

## **II. BEST PRACTICABLE SERVICE**

5. As set forth in Allegheny's Proposed Conclusions (Pars. 9-12) Allegheny would be entitled to a slight preference for integration of ownership in management. EZ does not dispute the point, contending instead that in view of the recent court ruling in Bechtel<sup>2</sup>, integration of ownership may no longer be relied upon. It should be noted, however, that the Commission has not yet announced: (1) whether it will seek review of the Bechtel ruling; and (2) what policy will be followed in the interim, which depends on the Commission's view as to the scope of the Bechtel ruling. It may be, for

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<sup>2</sup> Susan M. Bechtel, v. FCC, D.C. Cir. No. 92-1378 (Slip Opinion, December 17, 1993).

example, that Bechtel might be limited to instances where a party had challenged integration in a timely manner, as contrasted with this case where both applicants sought to make an integration showing. Given the uncertainties, it is respectfully submitted that the appropriate course is for an Initial Decision which applies prior precedent in a customary analysis. If it develops that such analysis is rendered academic, so be it. If it is subsequently determined that integration or some aspect of it remains, the analysis will be in place. Allegheny thus suggests that the appropriate resolution is the award to it of a slight preference for integration, which is the only distinction between the two applicants under the best practicable service analysis and thus translates into a slight overall preference for Allegheny under this criterion.

### **III. RENEWAL EXPECTANCY - WBZZ PROGRAMMING**

#### **A. Deficiencies in EZ's Presentation**

6. EZ's approach, in both its hearing exhibits and its Proposed Findings of Fact and Conclusions of Law, is to assemble voluminous lists and papers and to then present them in a cumbersome and confusing way, with the apparent hope of obfuscating just how little cognizable public affairs programming was broadcast over WBZZ during the seven year renewal period. A prime example of the EZ technique is its "Appendix B to WBZZ Proposed Findings". This "Appendix" consists of 115 pages, almost three times the length of the



text of EZ's Proposed Findings and Conclusions. Appendix B is thus central to EZ's case, but in the entire 115 pages of Appendix B there is not a single reference to a hearing exhibit or hearing transcript. Indeed, in the text, the only reference to Attachment B states (P. 15):

"Detailed information on the Pittsburgh community issues dealt with through WBZZ's local programs is provided in Attachment B to these Proposed Findings."

The tack of presenting 115 pages of undocumented, non-referenced assertions of fact is directly contrary to Commission Rule 1.264 which states in pertinent part

"Proposed findings of fact shall be set forth in serially numbered paragraphs and shall set out in detail and with particularity all basic evidentiary facts developed on the record (with appropriate citations to the transcript of record or exhibit relied on for each evidentiary fact) supporting the conclusions proposed by the party filing same. Proposed conclusions shall be separately stated." (Emphasis added).

7. The purpose of the Rule is to enable opposing counsel and ultimately the Presiding Administrative Law Judge to assess each party's proposed findings. Where there is not a single exhibit or transcript citation, that task is difficult, if not impossible. Moreover, and most significantly, it is the responsibility of EZ to present its case in accord with the Rules. The Presiding Judge should not, and is not, required to shuffle through 115 pages to determine if the assertions of fact are supported by the record. Having failed to abide by the Rules, EZ should suffer the consequences: "Attachment B" should be disregarded.

8. EZ's "Attachment A" is similarly infirm. This is a purported list of 325 community leader interviews contained in EZ's hearing exhibit 2 (EZ Proposed Findings, Par. 20). Again, however, there is in the Attachment not a single hearing exhibit page or transcript citation. EZ apparently expects the Presiding Judge to sift through hundreds of pages of a hearing exhibit in search of the names listed by EZ on "Attachment A". That is not in accord with the Rule as to proposed findings. Moreover, even if the list were checked and accepted, it is merely a list, without content or any correlation to programming. It is thus without decisional significance.

9. It should also be noted that EZ has further contravened Commission Rule 1.264 by failing to set apart, by separate paragraph numbering, its Proposed Conclusions from its Proposed Findings of Fact. While this defect is not so serious as those affecting EZ's attachments, it does reflect a cavalier approach to the Commission Rules and the burden such non-compliance places on the Presiding Judge.

B. Paucity of WBZZ Programming and Absence of Correlation to Ascertainment

10. EZ's cognizable Proposed Findings (Pars. 22-32) as to community issues addressed by WBZZ programming thus consists of a handful of general topics, spread over the seven year renewal period. Other than these examples, there was no attempt to properly relate substantive ascertainment to specific programming.

11. Moreover, even under the most generous interpretation of WBZZ programming, the central fact is that there was very little local WBZZ public service programming. In reality, the only program falling in that category was the Sunday morning program Dialogue, which was one hour per week and presented at seven to eight A.M. (Tr. 242-245). EZ attempts to increase its local programming by counting Pittsburgh Opinion but these were one-minute comments by the public in response to questions on a wide variety of topics, with the largest number of such questions relating to culture and recreation, entertainment and sports. (Allegheny Findings, Par. 58.) To contend that such brief, apparently off-the-cuff remarks by the man-in-the-street, constitute a meaningful response to or discussion of community issues illustrates just how thin (in substance) was the EZ showing.

12. The only other regular local programming relied on by EZ were "News Interviews". But again EZ has provided no information as to the length of such interviews, and considering the fact that WBZZ newscasts were, in their entirety, only three minutes, EZ can scarcely claim that such brief and fragmentary "interviews" constitute a meaningful program response (See Allegheny Findings Par. 55 and citations therein).

13. The only other programming (other than routine Public Service Announcements) relied upon by EZ was its early Sunday morning recorded programs, primarily furnished by

national religious organizations. Such programming was not local, and several of the programs contained music and religious matter, and thus cannot be considered as responsive to local ascertained needs. (See Allegheny Findings, Par. 56-57 and citations therein.)

C. The WBZZ Program Record Is Similar To Video 44  
Not Fox Television

14. EZ contends that it is entitled to a renewal expectancy of the strength accorded in Fox Television Stations, Inc., 7 FCC Rcd 2361, 72 RR 2d 297 (Rev. Bd. 1993). A comparison of the two records reveal substantial differences. Definitive findings as to the Fox station programming are contained in the Initial Decision, Fox Television Stations, Inc., 7 FCC Rcd 3801 (1992). There are these distinctions in the two cases:

Ascertainment

Fox, in only a thirty-three month renewal period had almost as many community leader interviews (269) as the number (325) claimed by EZ over a much longer renewal period of eighty-four months. Moreover, the Fox ascertainment was structured to be diverse and balanced in terms of geographic area and ethnic diversity (Fox I.D. Pars. 15-25). EZ made no such showing.

Correlation To Programming

Fox presented a detailed showing as to how local programming was produced to address ascertained

needs. (Fox I.D. Pars. 26-31.) EZ made no comparable showing.

#### Local Public Affairs Programming

Fox produced at least six regularly scheduled morning and mid-day local public affairs programs plus in-depth special local public affairs programs which were broadcast during prime evening hours. Fox also broadcast extensive editorial comment (Fox, I.D. Pars. 32-43, 58-63, 83-86). EZ had only the early Sunday morning program Dialogue.

#### News

Fox had fourteen news reporters and a total news staff of forty-eight persons. Fox broadcast in-depth newscasts at various times throughout the day including noon and prime-time evening hours, and presented a substantial showing of news specials (Fox, I.D., Par. 44-57). EZ has only one full-time news reporter, and broadcasts only brief three minute newscasts during the early morning, with no news after 9 A.M. until almost 1 A.M. the next day. (Allegheny Findings, Par. 55.)

15. As the above comparison illustrates, the WBZZ showing does not begin to compare with the Fox record. A far better barometer is the comparison with the record in Video 44, 6 FCC Rcd 4948, 69 RR 2d 975 (1971), as discussed in Allegheny's Proposed Conclusions Pars. 22-24. The EZ record

is not decisionally different than that found lacking in Video 44.

#### **IV. RENEWAL EXPECTANCY-WBZZ RULE AND POLICY VIOLATIONS**

16. If there is any similarity to the Review Board Decision in Fox, it is that even a strong renewal expectancy is diluted by licensee rule or policy violations. It is true that the Commission in affirming the Review Board (Fox Television Stations, Inc., FCC 93-543, released December 28, 1993) found no significant failure of rule or policy compliance. However, the principle remains that a renewal expectancy is, similar to all other comparative criteria, judged on a sliding scale and can be diluted or outweighed by rule or policy violations.

17. Allegheny (Proposed Findings Pars. 13-54), Proposed Conclusions 13-20) has shown a substantial and continuing violation by EZ of Commission law and policy regarding sexual harassment and discrimination. Thus, any EZ claim to a weak or marginal renewal expectancy based on WBZZ programming is more than offset by the flagrant sexual harassment which occurred.

#### **V. ULTIMATE CONCLUSION**

18. The final resolution of this proceeding should be that Allegheny's very substantial preference under diversification prevails over EZ's failure to establish a claim of renewal expectancy, taking into account its weak

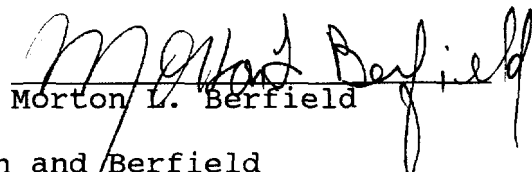
programming showing and the controlling finding of sexual harassment. Grant of Allegheny will bring a new voice to Pittsburgh and will demonstrate the agency's commitment to its rules and policies against sexual harassment. EZ would still retain a programming outlet through access to its other market station WQKB.

19. For all these reasons, Allegheny's application should be granted.

Respectfully submitted,

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Date: February 22, 1994

**CERTIFICATE OF SERVICE**

I, Linda Gibson, do hereby certify that on the 22nd day of February 1994, a copy of the foregoing "Reply Of Allegheny Communications Group, Inc. To Proposed Findings Of Facts And Conclusions Of Law Of EZ Communications, Inc. And Mass Media Bureau" was sent first-class mail, postage prepaid to the following:

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